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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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MICHAEL PETERSON, et al.,

Case No. [19-cv-00547-HSG](#)

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Plaintiffs,

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v.

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WELLS FARGO BANK, N.A., et al.,

**ORDER GRANTING MOTION TO  
DISMISS**

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Defendants.

Re: Dkt. No. 16

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On December 28, 2018, Plaintiffs Michael Peterson and Toni Peterson brought this suit against Defendants Wells Fargo Bank, N.A. (“Wells Fargo”), Wells Fargo Home Mortgage,<sup>1</sup> and Clear Recon Corp (collectively, “Defendants”) in Sonoma County Superior Court. *See* Dkt. No. 1-1. After Wells Fargo removed the action to federal court, Plaintiffs filed an amended complaint. Dkt. Nos. 1, 14 (“FAC”). Now pending before the Court is Wells Fargo’s motion to dismiss the FAC, briefing for which is complete. Dkt. Nos. 16 (“Mot.”), 34 (“Opp.”), 38 (“Reply”). After carefully considering the parties’ arguments, the Court **GRANTS** Wells Fargo’s motion.<sup>2</sup>

**I. BACKGROUND**

In December 2007, Plaintiffs obtained a \$900,000 loan from Wells Fargo’s predecessor-in-interest, World Savings Bank, FSB, which was secured by a deed of trust recorded against 4442 Arlington Ave, Santa Rosa, CA 95407-8306. FAC ¶ 19; FAC Ex. 1. In 2013, Plaintiffs first brought suit against Wells Fargo in connection with a loan modification. *See Peterson v. Wells*

<sup>1</sup> Wells Fargo contends that Wells Fargo Home Mortgage was erroneously named as a Defendant. *See* Dkt. No. 16. Because the Court grants Wells Fargo’s motion to dismiss in its entirety, it need not resolve the proper identification of Defendants here.

<sup>2</sup> The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b).

1     *Fargo Bank, N.A.*, No. 13-cv-03392-MEJ, 2015 WL 3397385 (N.D. Cal. May 26, 2015). The  
2     court there granted summary judgment in favor of Wells Fargo in May 2015. *Id.* In 2017,  
3     Plaintiffs brought a second suit against Wells Fargo, which came before this Court, alleging in part  
4     that Wells Fargo negligently reviewed their application for a loan modification by arbitrarily and  
5     inaccurately appraising Plaintiffs' application. *See Peterson v. Wells Fargo Bank, N.A.*, No. 17-  
6     cv-05137-HSG, 2018 WL 1948895, at \*3 (N.D. Cal. Apr. 25, 2018) (*Peterson II*). The Court  
7     dismissed without leave to amend Plaintiffs' negligent review claim because Plaintiffs "failed to  
8     allege that Defendant owed a duty of care either because Defendant's involvement in the loan  
9     transaction . . . exceed[ed] the scope of its conventional role as a mere lender of money, or because  
10    Defendant otherwise place[d] Plaintiffs in a position that created a need for their loan modification  
11    application." *Id.* at \*3 (internal quotation and citation omitted). The Court permitted other claims  
12    to proceed, however, and the parties ultimately reached a settlement in July 2018. *See* FAC ¶ 21;  
13    FAC Ex. 2 ("Settlement Agreement").

14           Under the terms of the settlement, Wells Fargo agreed to "conduct a new review of an  
15    application for a LOAN MODIFICATION REVIEW." FAC Ex. 2, ¶ 4.1. The agreement stated  
16    more than once that Wells Fargo promised nothing about the review's outcome. *Id.* ¶ 4.3  
17    ("PLAINTIFFS acknowledge that WELL'S FARGO'S LOAN MODIFICATION REVIEW shall  
18    not constitute a promise, representation, or guarantee that any such review will receive final  
19    approval, and nothing in this Agreement shall be construed as a promise, representation, or  
20    guarantee of such an approval."), ¶ 4.4 ("PLAINTIFFS acknowledge that, notwithstanding any  
21    conditional or final approval, WELL'S FARGO makes no promise, representation, or guarantee  
22    whatsoever concerning the results of the LOAN MODIFICATION REVIEW including, but not  
23    limited to, the specific financial terms of any potential loan modification."). The agreement  
24    further provided that no foreclosure sale would occur "until sixty (60) days after the date of  
25    denial." *Id.* ¶ 4.5.

26           On August 13, 2018, Wells Fargo denied Plaintiffs a loan modification "based on the  
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1 results of [Plaintiffs'] net present value (NPV) evaluation." *See* Dkt. No. 17 Ex. A.<sup>3</sup> On October  
2 5, 2018, Plaintiffs' counsel submitted a letter to Wells Fargo, seeking to "appeal the denial," based  
3 on alleged miscalculations of the NPV. *See* FAC ¶ 45; FAC Ex. 3. Wells Fargo responded on  
4 October 30, 2018, acknowledged Plaintiffs' counsel's letter, and maintained that its findings and  
5 denial were accurate. *See* FAC ¶ 46; FAC Ex. 4. On November 27, 2018, Wells Fargo sent  
6 Plaintiffs another letter, affirming its October 30, 2018 decision. *See* FAC ¶ 26; FAC Ex. 6.  
7 Wells Fargo ultimately set a January 2, 2019 date for a trustee sale, which was later postponed to  
8 March 13, 2019. *See* FAC ¶ 20.

9 Dissatisfied with the outcome, Plaintiffs filed this suit on December 28, 2018 in Sonoma  
10 County Superior Court, alleging that Wells Fargo's loan modification review was negligent. *See*  
11 Dkt. No. 1-1. After Wells Fargo removed the case to federal court, *see* Dkt. No. 1, it moved to  
12 dismiss the initial complaint, in part, for "attempt[ing] to convert a contract claim to a tort claim."  
13 *See* Dkt. No. 11 at 1. Plaintiffs thereafter filed an amended complaint, which added a claim for  
14 breach of the Settlement Agreement based on allegations identical to those that purportedly  
15 support their negligence claim. *Compare* FAC ¶¶ 18–39, *with id.* ¶¶ 40–61. Plaintiffs also filed a  
16 motion for a temporary restraining order to prevent Defendants from proceeding with a trustee  
17 sale, which this Court denied. *See* Dkt. Nos. 19, 36.

18 **II. LEGAL STANDARD**

19 Federal Rule of Civil Procedure ("Rule") 8(a) requires that a complaint contain "a short  
20 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
21 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which  
22 relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only  
23 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable  
24 legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To  
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26 <sup>3</sup> The Court finds that it may incorporate Wells Fargo's denial into the operative complaint by  
27 reference. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (explaining that under the  
28 incorporation-by-reference doctrine, a court may "take into account documents whose contents are  
alleged in a complaint and whose authenticity no party questions, but which are not physically  
attached [to] the [plaintiff's] pleading" (citation omitted)).

1 survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is  
2 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially  
3 plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable  
4 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
5 678 (2009).

6 In reviewing the plausibility of a complaint, courts “accept factual allegations in the  
7 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”  
8 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,  
9 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of  
10 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
11 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). The Court  
12 also need not accept as true allegations that contradict matter properly subject to judicial notice or  
13 allegations contradicting the exhibits attached to the complaint. *Sprewell*, 266 F.3d at 988.

14 If the court concludes that a 12(b)(6) motion should be granted, the “court should grant  
15 leave to amend even if no request to amend the pleading was made, unless it determines that the  
16 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d  
17 1122, 1127 (9th Cir. 2000) (en banc) (internal citations and quotation marks omitted).

18 **III. DISCUSSION**

19 Plaintiffs bring claims for (1) breach of the Settlement Agreement, and (2) negligent  
20 review of their loan modification application. FAC ¶¶ 18–61. Wells Fargo moves to dismiss each  
21 cause of action.

22 **A. Negligence**

23 As to Plaintiffs’ negligence claim, their theory of negligence is identical to the theory they  
24 advanced—and this Court rejected—in *Peterson II*. There, as here, Plaintiffs argued that this  
25 Court should follow *Alvarez v. BAC Home Loans Servicing, L.P.*, which found that lenders owe  
26 borrowers a “duty to exercise reasonable care in the review of their loan modification applications  
27 once they had agreed to consider them.” 176 Cal. Rptr. 3d 304, 306 (Ct. App. 2014). Compare  
28 *Peterson v. Wells Fargo Bank, N.A.*, No. 17-cv-05137-HSG, 2017 WL 6539743, at \*4–5 (N.D.

1 Cal. Dec. 21, 2017) (dismissing Plaintiffs’ negligence claim with leave to amend), *and Peterson*  
2 *II*, 2018 WL 1948895, at \*3 (dismissing Plaintiffs’ negligence without leave to amend for  
3 advancing the same arguments as the prior complaint and failing to present contrary intervening  
4 authority), *with Opp.* at 8–9 (arguing that Plaintiffs “believe the reasoning in *Alvarez* is  
5 persuasive”). But there, as here, the Court finds that the Ninth Circuit has limited *Alvarez*’s reach,  
6 and more important, “any harm to Plaintiffs is not primarily attributable to Defendant’s processing  
7 of Plaintiffs’ loan modification application. Rather, when the modification was necessarily due to  
8 the borrower’s inability to repay the loan, the borrower’s harm, suffered from denial of a loan  
9 modification, is not . . . closely connected to the lender’s conduct.” *See Peterson*, 2017 WL  
10 6539743, at \*5 (internal quotations and citations omitted); *see also Saldana v. Wells Fargo Bank*,  
11 N.A., No. 18-cv-01049-HSG, 2019 WL 501481, at \*6–7 (N.D. Cal. Feb. 8, 2019) (reaching the  
12 same conclusion). Last, there, as here, Plaintiffs have known the Court’s position on this cause of  
13 action but “fail to cite any intervening authority that would merit a different result.” *Compare*  
14 *Peterson II*, 2018 WL 1948895, at \*3 (discussing Plaintiffs’ failure to address or distinguish the  
15 Court’s prior holding), *with Opp.* at 9 (advancing the same *Alvarez* claim without addressing or  
16 distinguishing the Court’s prior holdings).

17 The Court finds no reason—and more important, Plaintiffs present the Court with no  
18 reason—to reconsider its prior holdings on this issue. The Court further finds that leave to amend  
19 is not warranted under the circumstances. Although this is the first dismissal order in this action,  
20 Plaintiffs are effectively relitigating the same argument, against the same Defendants, before the  
21 same court, for the third time. Plaintiffs’ repeated failure to present any principled basis for the  
22 Court to reconsider its prior holdings demonstrates that Plaintiffs’ negligence claim “could not  
23 possibly be cured by the allegation of other facts.” *See Lopez*, 203 F.3d at 1127. If such facts  
24 existed, Plaintiffs surely would have alleged them in the operative complaint.

25 Accordingly, the Court **DISMISSES** Plaintiffs’ negligence claim without leave to amend.

26 **B. Breach of Contract**

27 Plaintiffs allege two bases for breach of the Settlement Agreement. First, Plaintiffs allege  
28 that Wells Fargo’s post-settlement loan modification review “was a sham.” FAC ¶ 23. Second,

1 Plaintiffs allege that Wells Fargo’s initial scheduling of the trustee sale for January 2, 2019 was  
2 “within the agreed-upon sixty (60) day forbearance period” in the Settlement Agreement. *Id* ¶ 22.

3 As to the alleged “sham” review, Plaintiffs’ claim rests entirely on their disagreement with  
4 Wells Fargo’s NPV calculation and outcome. But disagreeing with the outcome is not evidence of  
5 a breach, let alone a “sham,” particularly when the contract at issue disavowed any promises on an  
6 outcome. As to the NPV calculation, Plaintiffs offer no explanation for why Defendants were  
7 obligated to adopt Plaintiffs’ computation, even if it were a reasonable alternative. And as a  
8 general matter, it is unclear what Plaintiffs’ “sham” theory of breach of contract even entails,  
9 particularly when Plaintiffs seek leave to amend the Complaint to allege a cause of action under  
10 California’s Unfair Competition Law (“UCL”). *See* Opp. at 10.

11 As to the initially scheduled trustee sale, the Court finds that Defendants did not breach the  
12 forbearance period provision under the only fair reading of the Settlement Agreement. The  
13 relevant provision of the Settlement Agreement provides, in whole:

14 4.5 WELLS FARGO will not proceed with any foreclosure sale on  
15 the PROPERTY while the LOAN MODIFICATION REVIEW is  
16 pending, and, if necessary, during an appeal of the denial decision.  
17 Upon notification of the result of the review, PLAINTIFFS will then  
18 have a 30 day period to appeal a loan modification denial, if the  
application is denied. If the loan modification application is denied,  
WELLS FARGO will not conduct the foreclosure sale until sixty (60)  
days after the date of the denial.

19 FAC Ex. 2, ¶ 4.5. The operative complaint recharacterizes this language as providing that “Wells  
20 Fargo [would] not conduct a foreclosure sale until sixty (60) days after the final loan modification  
21 denial.” FAC ¶ 21 (emphasis added). Not true. Although the agreement provides that Wells  
22 Fargo would not proceed with a foreclosure sale “during an appeal of the denial decision,” the  
23 sixty day forbearance window is explicitly anchored to the date of denial, not the resolution of  
24 appeals. Because no fair reading of this provision comports with Plaintiffs’ breach theory, this is  
25 thus not a case where ambiguity precludes dismissal. *Cf. Vigdor v. Super Lucky Casino, Inc.*, No.  
26 16-cv-05326-HSG, 2017 WL 2720218, at \*3 (N.D. Cal. June 23, 2017).

27 The Court further finds that leave to amend is not warranted as to Plaintiffs’ claim for  
28 breach of the forbearance provision. No new facts would change the forbearance provision’s

1 construction. Nor would new facts change the date of the denial. Accordingly, the Court  
2 **DISMISSES** Plaintiffs' breach of the Settlement Agreement's forbearance provision without  
3 leave to amend. As to Plaintiffs' theory that Wells Fargo's post-settlement loan modification  
4 review "was a sham," however, the Court cannot now say that Plaintiffs could not allege facts to  
5 support a claim, if given leave to amend. The Court thus **DISMISSES** Plaintiffs' "sham" review  
6 theory for breach of the Settlement Agreement with leave to amend. To the extent Plaintiffs seek  
7 to reframe their breach of contract claim as a UCL claim, Plaintiffs must articulate with clarity  
8 both the facts and law supporting whatever theory Plaintiffs advance.

9 **IV. CONCLUSION**

10 The Court **GRANTS** Wells Fargo's motion to dismiss the first amended complaint.  
11 Dismissal is with leave to amend, except as otherwise stated above. Any amended complaint must  
12 be filed within 21 days of the date of this order. This is the last opportunity Plaintiffs will be  
13 given to attempt to state a viable claim. If they again fail to do so, the Court will dismiss the case  
14 with prejudice without further notice.

15 The Court also **VACATES** the April 25, 2019 initial case management conference  
16 ("CMC"). The Court will reschedule the initial CMC if and when Plaintiffs state a viable claim.

17 **IT IS SO ORDERED.**

18 Dated: 4/22/2019

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HAYWOOD S. GILLIAM, JR.  
United States District Judge